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MONTANA PROSECUTOR

SEPTEMBER/OCTOBER, 1980 Vol. 4, No. 5

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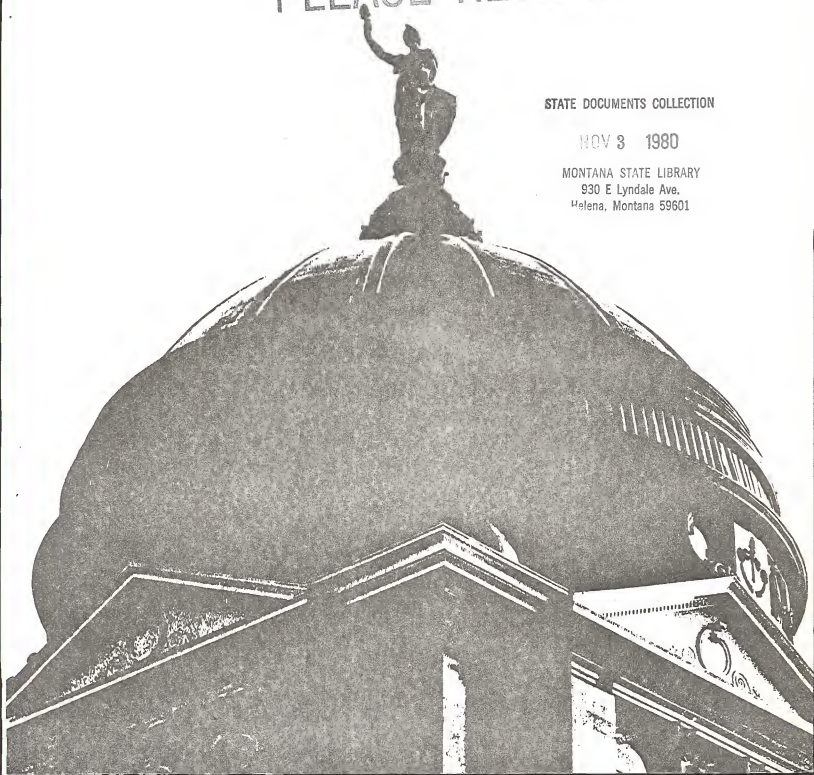


INTRODUCTORY NOTES

PENDERGRASS INSTRUCTION

On August 11, 1980 the Montana Supreme Court, in State v. Pendergrass, 37 St. Rptr. 1370 (1980), approved the use of the following instruction when the defendant does not take the stand or offer any evidence:

> "You are instructed that evidence is to be considered not only by its own intrinsic weight, but also according to the evidence which is within the power of one side to produce and of the other to contradict; and therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger or more satisfactory could have been produce, the evidence offered should be viewed with distrust."

County attorneys are encouraged not to offer this instruction because of the possibility that it adversely affects the presumption of innocence and allows the jury to draw an inference from the defendant's failure to testify. It may pose a Sandstrom-type problem in the future.

ETHICS - DISCIPLINARY RULE - COUNTY ATTORNEYS

The Montana Supreme Court recently adopted a disciplinary rule that directly addresses the ethical obligations of county attorneys. Disciplinary Rule 2-111(D), published in The Montana Lawyer, Vol. 6, No. 1, at page 19 states, in part:

> "County attorneys and their deputies, who prosecute in the name of the State of Montana, shall not accept employment in the defense of criminal matters anywhere in the State of Montana which involves conduct by a defendant occurring before the termination of such employment."

EVIDENTIARY FOUNDATIONS

An excellent work by Edward J. Imwinkelried, who appeared at the Evidence Seminar in Billings in December 1978, is available for $12.50 from:

> The Michie Company
> Bobbs-Merrill Law Publishing
> P.O. Box 7587
> Charlotteville, Virginia 22906

INCLUDED OFFENSES - MONTCLIRC MEMO 1657

In response to a request by Lewis and Clark County Attorney Charles Graveley MONTCLIRC has released a memorandum concluding that a defendant can be convicted of both burglary and theft when the charges arise from the same transaction. A copy of that memorandum will be provided, upon request, by MONTCLIRC.

INDIGENT DEFENDANTS

The Montana Supreme Court has ordered a hearing on December 3, 1980 on a petition presented by the Judiciary Committee of the State Bar requesting the Court to set uniform statewide fees for court-appointed lawyers representing indigent defendants. A copy of that petition can be obtained by contacting Karen Ferreira, County Prosecutor Services Bureau, 303 Roberts, Helena, Montana 59601, (449-3816).

SEARCH AND SEIZURE SEMINAR

On December 11 and 12, 1980 at the Ramada Inn in Billings there will be a search and seizure training seminar and legislative review for prosecutors. On December 11, 1980 the schedule of events is as follows:

10:30 a.m. - 11:30 a.m.	Legislative Review
11:30 a.m. - 12:00 noon	Business Meeting
12:00 noon - 1:30 p.m.	Lunch
1:30 p.m. - 2:30 p.m.	Dr. Ronald Rivers, Montana Department of Justice, Laboratory of Criminalistics
2:30 p.m. - 2:45 p.m.	Coffee Break
2:45 p.m. - 3:45 p.m.	Capital Punishment Update - Procedural Handling Of A Capital Case By John Maynard, Assistant Attorney General
3:45 p.m. - 4:00 p.m.	Coffee Break
4:00 p.m. - 5:00 p.m.	Capital Punishment - Continued
5:00 p.m.	Adjourn
5:00 p.m. - 6:30 p.m.	Social Hour - MCAA

On December 12, 1980 Associate Judge Charles E. Moylan, Jr. of the Maryland Court of Special Appeals will present a search and seizure seminar. Judge Moylan is one of the most respected and articulate authorities on the law of search and seizure in the country. The schedule of events for December 12, 1980 is:

8:00 a.m. - 9:00 a.m.	Registration
9:00 a.m. - 10:15 a.m.	Search and Seizure
10:15 a.m. - 10:30 a.m.	Coffee Break
10:30 a.m. - 12:00 noon	Search and Seizure
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:15 p.m.	Search and Seizure
2:15 p.m. - 2:30 p.m.	Coffee Break
2:30 p.m. - 4:00 p.m.	Search and Seizure
4:00 p.m.	Adjourn

A ten dollar registration fee will be assessed each participant. Please notify Karen Ferreira, County Prosecutor Services Bureau, 303 Roberts, Helena, Montana 59601, (449-3816) of your intention to attend by December 1, 1980.

BRIEF BANK INDEX

The brief bank index has been updated. A current copy is enclosed.

RECENT CASES AND NOTES

CROSS-EXAMINATION - WITNESSES

Refusal to allow defendant to ask the witness what his street address was did not deny defendant's confrontation rights where the witness "feared harrassment or retribution from appellant." State v. Baumann (Ariz.) 610 P.2d 38.

DEATH PENALTY - AGGRAVATING FACTORS

Shooting the victim through the head without warning may have been a cold-blooded, deliberate murder, but it did not constitute an especially depraved manner of killing. Likewise, evidence that appellant received the proceeds of an insurance policy for the murder was insufficient evidence he killed for pecuniary gain, where among other things the insurance agent had to remind him twice to submit a claim for the policy. State v. Madsen (Ariz.) 609 P.2d 1046.

DEATH PENALTY - MITIGATION

The trial court correctly found that defendant's consumption of alcohol did not constitute a mitigating factor in State v. Smith (Ariz.) 610 P.2d 46.

EVIDENCE DESTRUCTION

Destroying latent fingerprint which the state's expert considered useless did not deny defendant due process where the defense failed to show that the expert followed unreliable procedures or did the work negligently. Finding someone else's prints wouldn't have changed the fact that defendant's prints were found at the rape scene. "We do not believe, however, that due process requires the police to indefinitely preserve evidence after a qualified technician has concluded that it has no probative value, ***." State v. Schilleman (Ariz.) 609 P.2d 564.

HEARSAY

Admission of coconspirator's statements are proper under Rule 801(d)(2)(E) even though a conspiracy is not charged, as long as there is sufficient evidence of a conspiracy in the record to support admission of the statements. Here a conspiracy was charged and there was sufficient evidence to admit the coconspirator's statements. State v. Baumann (Ariz.) 610 P.2d 38.

ARGUMENT

Prosecutor's statements in closing argument that defendant was a sick and dangerous man and that he wounded himself to bolster his claim of self-defense did not deprive defendant of due process. People v. Williams 400 N.E.2d 980.

SUFFICIENT EVIDENCE - IDENTIFICATION

Items like radios and calculators do not have to be identified by their serial numbers. Proof that the stolen items resembled the items in defendant's possession is sufficient to withstand a motion for directed verdict. Here a calculator, television and radio were all property admitted and sufficiently identified as belonging to the victim. State v. Jones (Ariz.) 610 P.2d 51.

VALUE - FOUNDATION

Testimony that the witness priced televisions within a month of when the "sting" operation sold a "stolen" television set to defendant was sufficient foundation to allow further testimony that none of the sets priced were worth less than $100. Whether the makes and models were similar was a matter to be established by cross-examination. State v. Printz (Ariz.) 609 P.2d 570.

INFORMANTS

Where informant's purchase of marijuana leads to a warrant and arrest, informant's identity need not be revealed if defendant is not charged with the sale. Here defendant's conviction for felony possession was affirmed. Rowell v. State (Fla.App.) 382 So.2d 886.

VALUE - RELEVANCE

The price paid during a "sting" operation for a new television which was sold to defendant the next day as a stolen, used television was properly admitted both under Rule 401 and since purchase price has always been admissible on the question of value. Except where inconsistent, prior case law is controlling in Rule 401 relevance determinations. State v. Printz (Ariz.) 609 P.2d 570.

VALUE - WITNESSES

Officers did not need eletronic expertise before they could testify about the value of televisions that they priced; they were testifying about their personal knowledge and the testimony was properly admitted under Rule 602. State v. Printz (Ariz.) 609 P.2d 570.

HEARSAY - SEXUAL ASSAULT

Testimony that the victim screamed the name of her attacker in her sleep was not hearsay. State v. Steltzer. (Iowa) 288 N.W.2d 557.

ARGUMENT - COMMENT ON SILENCE

When prosecutor asked prospective juror whether he could remain open-minded until he had heard the "state's side" and the "defense's side", remark was not an impermissible comment on defendant's right to remain silent. A remark in closing argument that "defendant is the kind of person who thinks the world is out to get him" was a logical inference based upon the record. Gosney v. State (Fla.App.) 382 So.2d 838.

COMMENT ON SILENCE

Where defendant made a statement to police, following arrest and full Miranda, about his actions in the crime but refused to answer questions about whether intercourse occurred, comments by the prosecutor during closing remarks were not in error. "A deliberate omission in a voluntary statement to police is [not] tantamount to an exercise of the right to remain silent." People v. Clem (Cal.App.) 163 Cal.Rptr. 553.

CROSS-EXAMINATION - COMMENT ON SILENCE

Cross-examination of appellant who denied participation in a rape was not improper where the prosecutor asked him if he had informed anyone of his lack of participation and if police had given him the opportunity "to talk". "There was nothing in the record to suggest that petitioner's failure to relate potentially exculpatory information was an exercise of his Fifth Amendment rights." Nelson v. State (Ind.) 401 N.E.2d 666.

EVIDENCE - MOTION IN LIMINE

Even though the Alaska Supreme Court suppressed a statement, once the defense asked about the first part of the statement, which exonerated defendant, the state was entitled to elicit the second part, where the victim changed her story and named her husband as her killer. Johnson v. State (Alaska) 609 P.2d 553.

FELONY MURDER

Where the defendants burglarized an apartment and murdered a man while they were loading the stolen goods into their car, they could be convicted of felony murder since the burglary and the killing were part of a continuous transaction. People v. Eaker (Cal.App.) 161 Cal.Rptr. 417.

FELONY MURDER - ARSON

Defendant was properly charged with felony murder when his coperpetrator was burned to death in an arson case. State v. Perez (Fla.App.) 382 So.2d 731.

MIRANDA

Miranda warnings were unnecessary during a temporary detention for the purpose of questioning people acting suspiciously at the scene of a reported burglary. United States v. Collom (9th Cir.) 614 F.2d 624.

MIRANDA - PRIVATE SECURITY GUARDS

Where defendant, who was detained by a private security guard on suspicion of a store theft, made statements to the guard regarding her culpability, such statements were not rendered inadmissable by alleged failure of the guard to advise defendant of her Miranda rights. People v. Raitano (Ill.App.) 401 N.E.2d 278.

PLEA NEGOTIATIONS

Defendant's statement to a prison counselor that defendant would probably "cop" to manslaughter was not a statement during plea negotiations and was properly admitted. A defendant must have a subjective intent to engage in plea negotiations and the expectation must be reasonable; defendant didn't meet either prong of the test. United States v. Castillo (9th Cir.) 615 F.2d 878.

PRIOR BAD ACTS - WITNESSES

Testimony that the murder witness feared a prison sentence because defendant had a lot of friends in prison was properly admitted. It showed the reason the state promised the witness no prison was his fear, not to secure favorable testimony like the defense claimed. People v. Green (Cal.) 609 P.2d 468.

PRIVILEGES

The obvious presence of a security guard while appellant confessed a murder to the chaplain prevented any privilege from attaching. United States v. Webb (9th Cir.) 615 F.2d 828.

SEARCH AND SEIZURE - PRIVATE CITIZEN

The entry into a private citizen's apartment by another private citizen and the subsequent discovery of stolen goods did not offend defendant's Fourth Amendment rights. Hawkins v. U.S. (D.C.App.) 411 A.2d 378. (Not so in Montana)

SENTENCE

Consideration of defendant's imprisoned brother as an aggravating factor during sentencing of defendant for armed robbery was not error. People v. Taylor 400 N.E.2d 1-07.

SEARCH AND SEIZURE

Where police officers discovered a body, then followed a trail of blood to defendant's door, but no one answered the door despite noises indicating someone was inside, exigent circumstances justified a warrantless entry to prevent evidence destruction. People v. Moses (Colo.App.) 609 P.2d 1105.

A detective's actions in picking up a bag without identification, which had fallen from a conveyor belt, then assisting airline employees in opening it, did not convert a private search into a government search subject to the Fourth Amendment. The airline employees were opening the bag so its owner could be identified and the police had no clue that it contained contraband. Cocaine in plain view when the bag was open was properly seized. United States v. Gomez (9th Cir.) 614 F.2d 643.

SEXUAL ABUSE - EXPERT WITNESSES

Testimony by a Children's Services Division caseworker that children who had been sexually molested perceived and remembered the acts as occurring during sleep was properly admitted. "The average juror would not have experience dealing with sexually abused children and may believe account of this nature questionable." State v. Harwood (Or.App.) 609 P.2d 1312.

WITNESS - COMPETENCY

There was no error in the trial court's determination that an eight-year-old child was competent to testify under Rule 601 even though the court did not inquire as to the child's ability to gather accurate sense impressions and the ability to recall facts accurately. Such matters went to the witness's credibility, not her competency. State v. Pinkham (Maine) 411 A.2d 1021.

WITNESSES - VICTIMS

Where the victim of an assault could not be located for defendant's trial, the testimony of disinterested witnesses was legally sufficient to convict defendant. The victim's absence did not violate defendant's Sixth Amendment rights, since the state did not introduce any hearsay statements of the victim, nor was it responsibile for the victim's unavailability. State v. Salazar (Minn.) 298 N.W.2d 753.

PROSECUTION ARGUMENT - CHARACTERIZATION OF DEFENDANT - "TURKEY"

An alleged characterization of defendant in closing argument by a prosecuting attorney as a "turkey" could not be condoned or encouraged, but was not considered prejudicially erroneous in State v. Merritt, 591 S.W.2d 107, Mo.App., 1979.

MUNICIPAL AND COUNTY ATTORNEYS: CONFLICT OF INTEREST

The Supreme Court of New Jersey has held that an attorney, his partner or associate may not be counsel to a municipality, and at the same time, counsel to the county in which it is located. The Court stated that the interest of municipal and county attorneys to further the business and objectives of their respective governmental entities may frequently be antagonistic. Given the compelling public interest, full disclosure or consent would not dissipate the appearance of a conflict of interest. "We are satisfied that the interest of a municipality and its surrounding county may with some reasonable degree of probability conflict. We have no hesitancy in holding that because of the probability of such actual conflict, the appearance of impropriety is more than 'a fanciful possibility.'" Matter of Opinion No. 415, Etc., 407 A.2d 1197, N.J., 1979.

TRIAL JUDGE - MANDATORY RETIREMENT REQUIREMENTS - CONSTITUTIONALITY

A state constitutional requirement (P.S. Pa. Const. Art. 5, Section 16(b)) which required state court judges to retire at age 70 was held to violate the right to due process because it created an impermissible irrebutable presumption and violated equal protection principles because it was not rationally related to any legitimate state purpose. The irrebutable presumption was struck down on due process grounds. Malmed v. Thornburgh, 478 F. Supp. 998, Pa., 1979.

WARRANTLESS SEARCH - EXIGENT CIRCUMSTANCES - INITIAL STOP FOR TRAFFIC OFFENSE

Where a police officer made an investigative stop of the defendant's automobile, based upon reasonable suspicion that defendant may have been operating the car while intoxicated, and based upon his observations of the defendant's behavior before and after the initial stop, there was probable cause to make an arrest, and a warrantless seizure of a spoon lying on the floor of the vehicle was justified under the "plain view" doctrine, a warrantless search beneath the driver's seat and seizure of incriminating items found there was reasonable. "Here, the search in question took place on a public thoroughfare while the subject automobile was in actual transit, and it was closely tied in time and place to the point of arrest. Moreover, the scope of the search was narrowly confined to an area immediately surrounding the spot where the first incriminating object was seized...The fact that the searching officer was aided by a flashlight in his discovery of the syringe and the vial does not in this case, undermine the reasonableness of his actions." State v. Powell, 603 P.2d 143, Hawaii, 1979.

WARRANTLESS SEARCH - EXIGENT CIRCUMSTANCES - FIRE SCENE - MICHIGAN V. TYLER

A search conducted by a fire marshal more than 24 hours after a fire was extinguished in a building was sufficiently attenuated from the entry for the purpose of extinguishing the fire so as to require an administrative warrant procedure. It could not be justified under the "actual continuation" rule of Michigan v. Tyler, 436 U.S. 510-11 (1978) wherein it was held that the warrantless inspection of a building for the purpose of the cause of a fire is permissible if it is a "factual continuation" of the initial permissible entry to fight the fire. No "actual continuation" could be found on these facts where over 24 hours had passed from the time the fire was extinguished until the investigation was launched, and the building had been left unattended until the fire marshal's arrival, indicating that re-ignition was not a major concern. State v. Hansen, 286 N.W.2d 163, Iowa, 1979.

SEARCH INCIDENT TO ARREST - SELF-PROTECTIVE SEARCH OF PREMISES

Where officers arresting a person with a warrant at the rear door of a residence had previously experienced problems posed by persons whose presence was unknown to them at the time they sought to make an arrest, and they were informed by the arrested person that there was another person in the house, they were justified in making a protective sweep of the house to locate such person in order to prevent any threat to the personal safety of the officers. This conduct was reasonable and they properly entered a bedroom where they seized heroin in plain view. Williams v. State, 397 N.E.2d 1088, Ind.App., 1979.

MIRANDA - WAIVER - REQUEST TO SPEAK OFF THE RECORD

A defendant's request to speak "off the record" did not constitute a knowing and intelligent waiver of Miranda rights. "A request to speak 'off the record' cannot constitute a knowing and intelligent waiver of rights which include the advisement that 'anything [a suspect] says can be used against him in a court of law'...Indeed, defendant's request revealed a marked lack of understanding of the Miranda warnings...Sergeant Cervi then contributed to defendant's lack of understanding by agreeing to the request rather than informing defendant that there could be no such thing as an off the record discussion." The continued interrogation of the defendant was held to be in violation of Miranda and the confession resulting therefrom was inadmissible. People v. Braeseke, 602 P.2d 384, Cal., 1979.

MIRANDA - CUSTODY - TAKING FINGERPRINTS

Where police intend to take a suspect's fingerprints for elimination purposes in their investigation, this, in and of itself, does not create a custodial situation requiring the recitation of Miranda warnings. Harris v. State, 376 So.2d 773, Ala.App., 1979.

MIRANDA - ADEQUACY OF WARNING OF RIGHT TO COUNSEL - CONDITIONAL LANGUAGE

A Miranda warning whereby the defendant was informed that "you have a right to have an attorney and if you cannot afford to have an attorney one could be arranged to be appointed for you", was held to be inadequate because it failed to advise the defendant of his present right to consult with an attorney and his right to have one appointed prior to questioning if he could not afford one and did not clearly inform the defendant that he had a right to have counsel present with him during interrogation and, thus, his interrogation was improper. "[Defendant] was not told that he was entitled to consult with an attorney before being asked any questions or that he had a right to have an attorney present with him during questioning. Furthermore, we think that the explanation of his right to have an attorney appointed for him if he could not afford to hire one would have left the impression in a reasonable lay person's mind that the right was not unconditional but attached only at some time in the future." State v. Cassell, 602 P.2d 410, Alaska, 1979.

MIRANDA - WAIVER - RIGHT TO REMAIN SILENT - REFUSAL TO PUT ORAL STATEMENT INTO WRITING

A defendant's mere refusal to put into writing a previous oral statement made to the police did not amount to a request to remain silent for Miranda purposes and did not, therefore, require suppression of a second oral statement. Even if the second oral statement had been made in violation of the Miranda rule, a refusal by the trial court to suppress it was harmless where the statement was essentially the same as the first statement which was admitted, so that the second statement was merely cumulative. People v. Woods, 396 N.E.2d 1204, Ill.App., 1979.

MIRANDA - WAIVER - REQUEST TO SPEAK "OFF THE RECORD"

Merely because a defendant, in custody, and after being fully advised of his Miranda rights, states that he will speak "off the record", does not constitute an exercise of his constitutional privilege to remain silent. "He [defendant] does not suggest he was inadequately advised of his right to remain silent as is required by Miranda nor did he testify that he either failed to understand those rights or that he had some basis to believe he had an additional right to make a statement 'off the record' which could not thereafter be used against him. Defendant did not inquire of Officer Williams whether he could speak 'off the record' but, instead, stated he would do so and proceeded to respond to the officer's question regarding damage to the vehicle. Neither Miranda nor any other presently existing rule of law requires that a defendant be admonished that there is no 'off the record' privilege...Nor did defendant testify that he would not have made a statement to the officer had he known it could be used against him even though 'off the record'. Such a claim would be quite clearly inappropriate in the fact of the warning given to him that 'anything you say can and will be used against you in a court of law' which he said he understood." People v. Eatherly, 397 N.E.2d 533, Ill.App., 1979.

CONSPIRACY - UNDERCOVER LAW ENFORCEMENT OFFICER AS CO-CONSPIRATOR

The offense of conspiracy could not be committed by a defendant where the main co-conspirator was an undercover law enforcement officer acting within the scope of his duties and feigning participation in the criminal enterprise. Conspiracy had traditionally been defined and judically interpreted as requiring an actual subjective intention in at least two person, because that is the prohibited harm. Whether the intended conduct ever results, is immaterial. Archbold v. State, 397 N.E.2d 1071, Ind.App., 1979.

ROBBERY - FORCE - ROLLING

Where defendant, with the assistance of a companion, rolled a sleeping man onto his stomach and then took his watch and wallet, he was not guilty of statutory robbery since no "force" was used in the rolling and taking. State v. Cohen, 396 N.E.2d 235, Ohio App., 1979.

DRIVING WHILE INTOXICATED - PHYSICAL CONTROL OF AN AUTOMOBILE - SITTING BEHIND THE WHEEL

It has been held that an intoxicated individual, although unconscious, positioned behind the wheel of a running automobile, is in "actual physical control" of the automobile within the purview of a drunk driving statute. Mason v. State, 603 P.2d 1146, Okla., 1979.

IDENTIFICATION EVIDENCE - DEFENDANT'S WIFE'S FINGERPRINT - STANDING AND PRIVILEGE

A husband had no standing under the Fourth Amendment to challenge the taking of a fingerprint by the authorities from his wife, which fingerprint was sought to be used to corroborate accomplice testimony that the defendant and his wife were at a certain place shortly before the crime, notwithstanding a claim that since the wife was not a defendant in the case the evidence was sought for use strictly against her husband-defendant. Nor did the taking of the wife's fingerprint violate a marital privilege. Any husband-wife privilege otherwise available to the husband could comprehend only testimonial or communicative evidence taken from the wife in order to convict him. United States v. Thomann, 609 F.2d 560, 1st Cir., 1979.

DOUBLE JEOPARDY - CORRECTION OF ILLEGAL SENTENCE - INCREASE OF SENTENCE

Where a sentence does not conform to statutory requirements and is thus illegal, a correction which produces a valid sentence does not place the defendant in double jeopardy, even though that correction increases the punishment. State v. Fry, 602 P.2d 13, Hawaii, 1979.

WITNESS - INFORMER - DEFENDANT'S RIGHT OF CONFRONTATION AND CROSS-EXAMINATION

Where an informer's presence during the commission of a narcotics offense was placed before the jury in the prosecutor's opening statement, and in the testimony of the State's only other witness to the transaction, so as to be tantamount to hearsay corroboration of the witness's otherwise uncorroborated testimony, defendant was denied his Sixth Amendment Right of Confrontation and Cross-Examination by non-production and non-disclosure of the informer. State v. Know, 603 P.2d 199, Kan., 1979.

WITNESS - EXPERT WITNESS - TESTIMONY CONCERNING FOOTPRINTS

A non-expert witness could properly be permitted to testify that certain "footprints" had been made by tennis shoes. Such a witness could also properly testify that the design of a footprint was the same as the design or pattern of a shoe worn by the defendant. The general principle at work here is that a non-expert witness may testify to his general conclusion derived from a number of indescribable instances or elements as the statement, not of opinion, but of a composite fact. Objections would go to the weight and not to the admissiblity of such testimony. State v. Hairston, 396 N.E.2d 773, OhioApp., 1977.

SPEEDY TRIAL - DELAY IN ARREST

A nineteen and one-half month delay between the commencement of prosecution and the defendant's arrest was held to deny him his right to a speedy trial where defendant was not informed of the outstanding warrant prior to his arrest and had no reasonable means of discovering its existence, defendant was incarcerated in a state prison when the information in the case was filed, but no detainer was filed by the State. The Court held that the defendant had been prejudiced because, had he been given a speedy trial and been found guilty, any sentence imposed would likely have been ordered to run concurrently with the sentence the defendant was then serving. Williams v. Darr, 603 P.2d 1021, Kan.App., 1979.

PROBATION - REVOCATION - INTENTION TO VIOLATE CONDITIONS

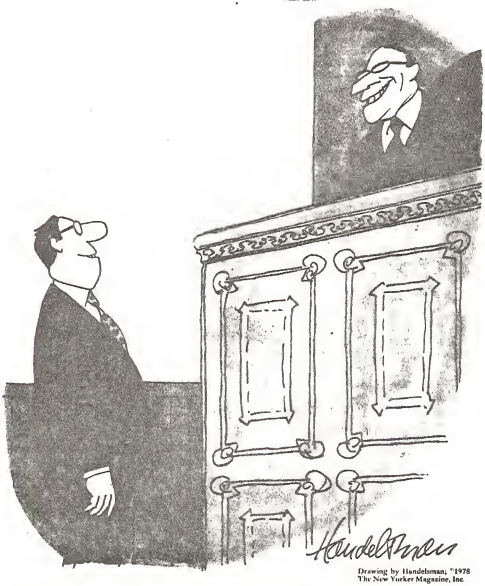
Probation cannot be revoked solely on the basis of a defendant's express intention to violate conditions. "While we have found no case dealing with the precise issue before us, the case law strongly suggests that before probation can be revoked, there must be a showing of some overt material violation - some act evidencing an intent to contravene the good intentions of the sentencing magistrate and an inability to comport with the restrictions that accompany probation...A statement of future intent, particularly one so dubious in sincerity as this, falls far too short of overt conduct to support a revocation." Blue v. State, 377 So.2d 1016, Fla.App., 1979.

SENTENCE - DEATH PENALTY - EYE WITNESS ACCOUNT OF EXECUTION

No error was committed by a trial court in refusing to allow the defendant to present an eye witness account of a gas chamber execution during the sentencing phase of the defendant's trial. "The evidence was in no way connected to defendant, his record or the circumstances of the charged offense. It was totally irrelevant and, therefore, properly excluded by the trial judge." State v. Johnson, 259 S.E.2d 752, N.C., 1979.

PROBATION - REVOCATION - DISCOVERY

Due process requirements for revocation of probation proceedings do not extend to discovery for probationers. The Supreme Court of Illinois takes the position that although discovery rules do not specifically exclude probation or parole revocation hearings, they were designed for use in connection with criminal trials and they do not entitle a probationer to discovery in probation revocation hearings. People v. DeWitt, 397 N.E.2d 1385, Ill., 1979.



Drawing by Handelsman, ©1978 The New Yorker Magazine, Inc.

"Well, this trial has provided us all with a lot of laughs, hasn't it? But, if I may be serious for a moment, I find you guilty as charged and sentence you to twenty years in the pen."

DEATH PENALTY

An aggravating factor of cruel and heinous killing outweighed the mitigating factor that defendant had no criminal record, and the death penalty was properly imposed. The idea that one mitigating factor balances one aggravating factor ignores the statutory command to consider whether the mitigation is "sufficiently substantial to call for leniency." State v. Knapp (Ariz.) 611 P.2d 90.

INTENT - CHILD STEALING

Defendant was not entitled to determine by himself that an out-of-state custody order was void on its face, and therefore ignore it. His conviction for attempted child stealing is affirmed. State v. McLaughlin (Ariz.) 611 P.2d 92.

INTOXICATION - EXPERT WITNESSES

Barring psychiatric testimony about the effect of intoxication on the ability to form intent was proper under Rule 702, since the effects of alcohol "are within the common knowledge and experience of the jury." Evidence of intoxication is admissible to show inability to form specific intent, but "wholly voluntary acts of a defendant will not excuse his subsequent criminal conduct." State v. Laffoon (Ariz.) 610 P.2d 1045.

JUDGES - BIAS

A statement by the judge that he felt defendant was guilty was not a statement showing prejudice. In context the remark was a response to defense arguments that the death penalty could not be imposed because there were "tremendous questions" about the case. State v. Knapp (Ariz.) 611 P.2d 92.

ARGUMENT

Comment in prosecutor's closing argument on defendant's failure to call alibi witnesses was not prejudicial since defendant had mentioned them during opening argument. People v. Kane (Ill.App.) 401 N.E.2d 1310.

Refusal to allow a defense attorney to quote a passage from the Bible that the testimony of two witnesses was required to convict a defendant was proper. State law provided that the testimony of the prosecutrix was all that was necessary; neither side was entitled to misstate the law. Wade v. State (Ala.Cr.App.) 381 So.2d 1057.

CONFLICT OF INTEREST

If there has been a knowing and intelligent waiver of a possible conflict of interest or if there is no indication that the defense of either defendant was inhibited to any degree, an alleged conflict of interest need not result in reversal. People v. Robinson (Ill.) 402 N.E.2d 157.

DWI - TRAFFIC OFFENSES

An officer is not required to give Miranda warnings prior to administering a field sobriety test to a suspected DWI driver. The test involves merely the exhibition of physical characteristics, and does not invoke the Fifth Amendment or require Miranda warnings. People v. Ramarez (Colo.) 609 P.2d 616.

EVIDENCE

When defendant has admitted to hitting victim on head with sawed off pool cue stick, it was not error to admit as evidence a similar cut stick, since the original one was never recovered. Gunn v. State (Ga.) 265 S.E.2d 862.

EXTRADITION

Under Uniform Interstate Extradition Act extradition demand must allege defendant's presence in demanding state at time of the alleged offenses. Without such an allegation demand is fatally defective. State ex rel Gandert, III v. Roberts (Fla.App.) 381 So.2d 1191.

FELONY MURDER

Where defendant on a moving subway train attempted to snatch a purse from the victim on a platform resulting in the victim being pulled between the train and platform causing her death, a felony-murder conviction was upheld. People v. Santiago (N.Y.) 402 N.E.2d 121.

FIFTH AMENDMENT - INFERENCES

A statute which states that possession of recently stolen property, unless explained, creates an inference that the person in possession of the property knew it was stolen does not violate defendant's right against self-incrimination by forcing defendant to testify. The statute permits defendant to explain possession by evidence other than his own testimony. Edwards v. State (Fla.) 381 So.2d 696.

HOMICIDE - IDENTIFICATION

Circumstantial evidence of victim's identity is permissible when no facial identification is possible due to decomposed condition of remains. People v. Gaskins (Ill.App.) 504 N.E.2d 258.

INSANITY - WITNESSES

Lay testimony of witnesses to murder and armed assault with intent to murder was sufficient to rebut unanimous psychiatric testimony that defendant was temporarily insane at the time he committed the offenses. Case was reversed and remanded on other grounds. Commonwealth v. Cole (Mass.) 402 N.E.2d 55.

INSTRUCTIONS

Instruction that, "...' it must appear that the person attacked was so situated and endangered that he honestly believed that he had reasonable grounds for believing that he was in imminent danger of death or serious bodily harm...'" (emphasis supplied by appellate court) did not shift the burden of proof to defendant on the issue of self-defense. Lemley v. State (Ga.) 264 S.E.2d 881.

INSTRUCTIONS - FLIGHT

Defendant was not entitled to an instruction that the absence of flight showed an innocent state of mind. People v. Green (Cal.) 609 P.2d 468.

MIRANDA

Defendant's contention that her statements were involuntarily made because several hours elapsed between the Miranda warnings and her confession is defeated in Taylor v. State (Nev.) 609 P.2d 1238.

A knowing and intentional waiver of right to counsel is not invalid though made without defendant's retained counsel present or without notice to counsel even when counsel's assistance had been requested earlier at all questioning by police subsequent to being retained. Defendant's reluctance to answer some questions about details of the offense confessed to is not a reassertion of his right to remain silent when he responded to other questions without apparent reluctance. People v. Aldridge (Ill.) 402 N.E.2d 176.

PAROLE REVOCATION

Washington holds that defendant prevailing at a parole revocation hearing does not preclude the state from filing the underlying criminal charges. State v. Dupard (Wash.) 609 P.2d 961.

PICTURES - PHOTOS

The admission of gruesome, color pictures depicting the deceased and pools of blood in the office where homicide occurred is proper since the pictures were of probative value in showing the layout at the scene of the shooting. Cessna v. State (Miss.) 381 So.2d 173.

PROSECUTORS - COMMENT ON SILENCE

Where a mistrial was granted at request of defendant because of prosecutor's comment on his failure to testify, this did not constitute "prosecutorial overreaching" and thus double jeopardy was not a barrier to retrial. Standyvent v. State (Ga.App.) 264 S.E.2d 695.

SEARCHES AND SEIZURES - AIRPLANES

Where police investigators obtained evidence by flying over private property such evidence was not inadmissible as a tresspass and unlawful search. The court also noted that even if the search were illegal, the evidence was seized in an "open field" for which Fourth Amendment protections do not extend. Reece v. State (Ga.App.) 264 S.E.2d 258.

SPEEDY TRIAL

Defendant's right to a speedy trial was not violated where a substantial portion of the delay in going to trial was caused by defendant's legal initiatives in an attempt to obtain a dismissal of the charges. The court determined that defendant's tactics were designed to prevent trial, and defendant failed to prove any prejudice by the delay. Hill v. Wainwright (5th Cir.) 617 F.2d 375.

Drawing by Handelsman 1963
The New Yorker Magazine, Inc.

Mister, you're really asking for justice!

DRUGS AND NARCOTICS - JUDICIAL NOTICE

Whether phencyclidine is a controlled substance can be judicially noticed by the court with an appropriate instruction given to the jury. State v. Hodds (Idaho) 611 P.2d 1047.

SEARCH AND SEIZURE - SEARCH WARRANTS

Officers serving a search warrant on a house could frisk the two occupants for weapons where one of the two occupants was selling heroin and officers saw a suspicious bulge that might have been a weapon. When the officer felt a soft lump that his experience indicated was heroin he had probable cause to arrest the defendant. State v. Broadnax (Wash.App.) 612 P.2d 391.

SEARCH WARRANTS

In order to be entitled to a hearing on the truth of the statements in the search warrant affidavit, the defendant must show the affiant lied, offer proof about what statements were false and name the witnesses who will testify that the statements were false. State v. Weigel (Kan.) 612 P.2d 636.

THEFT - INSTRUCTIONS

Defendant was not entitled to instructions on abandonment or voluntary termination where the only reason he dropped the stolen goods was because he was about to be captured inside the store. In any case the theft was completed, when defendant took the pants; "escape is not a necessary element of the crime of theft." State v. Eagle (Utah) 611 P.2d 1211.

TRAFFIC OFFENSES - SUMMER RERUN

The practice of ordering drivers stopped for traffic offenses to get out of the car, for the officer's safety, is constitutionally permissible. Pennsylvania v. Mimms, 98 S.Ct. 330 (1977).

VOICES - IDENTIFICATION

A witness can identify defendant's voice as being the same as the voice of the robber without having to be an expert in voice identification. State v. Weigel (Kan.) 612 P.2d 636.

EVIDENCE DESTRUCTION - RAPE

Loss of the knife found on defendant when he was captured during the rape did not prevent the victim from testifying about the defendant threatening her with the knife in his pocket. The evidence was relevant under Rule 402 to show force or fear; "The fact that the knife was unavailable for presentation to the jury did not prevent testimony concerning the existence of the knife." State v. La Mountain (Ariz.) 611 P.2d 551.

CROSS-EXAMINATION - FIFTH AMENDMENT

Refusal to allow defendant to call a co-perpetrator and force him to invoke the Fifth Amendment before the jury was error; the overwhelming evidence meant the error did not contribute to the conviction. State v. Gretzler (Ariz.) 612 P.2d 1023.

DEATH PENALTY - AGGRAVATING CIRCUMSTANCES

Unnecessarily killing a couple who had been separated, gagged and bound for several hours under intense doubt about their fate while stress caused one victim to have to be given valium, constituted a heinous killing deserving the death penalty. The failure of a judge in a separate trial of the co-defendant to find the killings were heinous did not prevent the finding on this record, even though the codefendant allegedly "actually did the killings." State v. Steelman (Ariz.) 612 P.2d 475.

An unnecessary barrage of posthumous violence on two victims, with a pause while defendant waited for the second victim, constituted the aggravating circumstances of a heinous killing and a depraved killing. The alleged mitigating circumstances were contradicted by the defense evidence and failed to outweigh the aggravating circumstances. State v. Ceja (Ariz.) 612 P.2d 491.

DEATH PENALTY - MITIGATING CIRCUMSTANCES

The significant impairment to defendant's capacity to conform his conduct to the law was insufficient mitigation to overcome the harm he did society when, after the two charged murders, he subsequently killed four adults, three teenagers and two young children. Death penalty affirmed. State v. Steelman (Ariz.) 612 P.2d 475.

FELONY-MURDER - DEATH PENALTY

Defendant's direct participation in the killings allowed imposition of the death penalty, even though he may have been convicted under a felony-murder theory. State v. Steelman, (Ariz.) 612 P.2d 475.

PICTURES - PHOTOS

Black and white pictures of the bound and gagged murder victims proved malice aforethought, illustrated and explained testimony and corroborated the State's theory of the case. State v. Gretzler, (Ariz.) 612 P.2d 1023.

PRIOR CONVICTIONS - IMPEACHMENTS

The defendant may be impeached by convictions for crimes which occurred after the charged crimes. State v. Gretzler (Ariz.) 612 P.2d 1023.

HYPNOSIS

The Arizona Supreme Court does not feel the record was sufficient to justify admission of testimony developed by hypnosis. However, admission of the testimony was harmless error because of overwhelming evidence. Among other things, the "expert" was a police officer who had been using hypnosis only one year, attended two schools, was connected to the investigation and sent the victim back under hypnosis to try again after an initial misidentification. (A memo on hypnosis successfully submitted in one of the Theodore Bundy cases is available, call County Prosecutor Services Bureau at 449-3816.) State v. La Mountain (Ariz.) 611 P.2d 551.

PROBATION REVOCATION

This case is a catalogue of probation revocation issues, including revocation for violation of probation implementation orders, sufficiency of notice, incorrect legal advice, estoppel and holding a defendant must challenge probation conditions instead of violating them. State v. Watkins (Ariz.) 611 P.2d 923.

ADMISSION - CODEFENDANT'S STATEMENT

Where both defendant and codefendant testified at trial, thus subjecting themselves to cross-examination, their police station statements were not subject to exclusion under the Bruton rule. Spillers v. State of Arkansas (Ark.) 595 S.W.2d 650.

ARGUMENT - INVITED ERROR

An indirect comment on defendant's failure to testify was not prejudicial where the defense attorney had already told the jury that the defendant didn't testify on the defense attorney's advice. Green v. State (Okl.Cr.) 611 P.2d 262.

ARREST - EXCLUSIONARY RULE

While shooting an apparently unarmed fleeing burglary suspect constituted the use of excessive force, the excessive force did not justify the superior court's action when the court invoked the exclusionary rule. State v. Sundberg (Alaska) 611 P.2d 44.

CHANGE OF VENUE - RACIAL COMPOSITION OF JURY

Where black defendant was tried for armed robbery and sought change of venue to a jurisdiction that included a larger percentage of blacks that could serve as jurors, the motion was properly denied. A defendant may not obtain a change of venue solely on the basis of being tried by a more "desirable peer group." Here, defendant failed to meet his burden of proving underrepresentation in the original jurisdiction. Johnson v. State (Md.Ct.App.) 411 A.2d 118.

CONSTITUTIONALITY OF STATUTES

The constitutionality of Washington marijuana statutes are upheld against equal protection, cruel and unusual punishment and right of privacy attacks. State v. Smith (Wash.) 610 P.2d 869.

CORPUS DELICTI - CONFESSIONS

Proof that the victim had died of strangulation and her body had been abandoned in the woods was sufficient corpus delicti to admit defendant's confession to the murder. "Proof of the corpus delicti does not include proof of defendant's connection with the crime charged." State v. Wood (Mo.) 596 S.W.2d 394.

ENTRAPMENT - INSTRUCTIONS

An instruction (verbatim in opinion), which stated the use of an informant or decoy to give defendant an opportunity to commit the crime didn't constitute entrapment, was upheld in State v. Smith (Wash.) 610 P.2d 869.

EVIDENCE

Photographs which showed that the victim had been shot 3 times in the head were admissible. The pictures corroborated other testimony and showed intent since defendant used a derringer that could only be fired twice without reloading. State v. Cason (Mo.) 596 S.W.2d 436.

In a case where defendant was charged with lewd and lascivious conduct and oral copulation with a child, trial court did not abuse its discretion in admitting several hundred photographs and several cartons of slides of other boys in the nude to rebut defendant's testimony that he took pictures at victims request for victim's girlfriend. People v. Reeves (Cal.App.) 164 Cal.Rptr. 426.

HEARSAY

Statements made by child complainant to examining doctor and nurses that fellatio had occurred were admissible under Rule 803(4). Defendant's right to confrontation was not violated since the child was available for cross-examination. State v. Serna (Minn.) 290 N.W.2d 446.

INSTRUCTIONS - INTOXICATION

Failure to instruct jury on intoxication in a specific intent crime was not grounds for reversal since evidence that defendant was drinking did not establish that he was intoxicated. Commonwealth v. Reiff (Pa.) 413 A.2d 672.

LICENSE REVOCATION - TRAFFIC OFFENSES

Actual receipt of notice of license revocation proceedings is not required in license suspension cases in Washington. Service of notice by regular mail is sufficient in Washington. (Well reasoned case.) State v. Thomas (Wash.App.) 610 P.2d 937.

MIRANDA

Admission of illegally obtained confession was harmless error where defendant reiterated the same story on the witness stand. Commonwealth v. Rive (Pa.) 413 A.2d 739.

PRIOR CONVICTIONS

Armed robbery and other larceny offenses are crimes of dishonesty included within Rule 609(a). Alexander v. State (Alaska) 611 P.2d 469.

PROSECUTORS - CHARGES

"Mere failure to prosecute other offenders (in the same crime) is not sufficient by itself to support a finding of a denial of equal protection." State v. Horn (Idaho) 610 P.2d 551.

RAPE

The temporary exclusion of all spectators from the trial courtroom during the testimony of a rape and sodomy victim did not violate defendant's right to a public trial. Here, the purpose of the exclusion was to protect the witness from needless embarrassment and emotional trauma. State v. Santos (R.I.) 413 A.2d 58.

SEARCH WARRANTS

Citing inter alia a recent Arizona Supreme Court case the Nevada Supreme Court holds that photographs of nude minors are "more likely to be retained than discarded", so a delay of 15 days between the incident and the warrant did not invalidate the warrant. The court also cites another Arizona Supreme Court case for the proposition that a mistake in the address did not invalidate the warrant where the description given left no reasonable possibility that any other premises would be searched. Lucas v. State (Nev.) 610 P.2d 727.

SEXUAL ABUSE

Where defendant forced complainant to remove her clothes and proceeded to whip her with his hand and a clothes hanger as a means of satisfying his sexual desires, the action was sufficient to constitute sexual assault. The Court found the whipping to be "sexual contact." State v. Mar (Minn.) 291 N.W.2d 223.

TRAFFIC OFFENSES - ARREST

Where a police officer stops a motorist for a traffic violation he has the proper authority to request the motorist to get out of the vehicle. People v. Superior Court For County of Los Angeles (Cal. App.) 164 Cal.Rptr. 116.

SEX - WITNESSES

Questions about whether the defense witness was living with defendant while defendant's wife lived elsewhere and whether the defense witness was having sexual intercourse with defendant during trial showed motive and bias, and were relevant. Dilworth v. State (Okl.Cr.) 611 P.2d 256.

VOLUNTARINESS OF STATEMENTS

Telling defendant that if he would be cooperative with California authorities, Nevada would release him OR, was not a promise making his confession invalid, since he still had to return to Nevada to face charges. A promise to recommend leniency if defendant cooperated "did not render the Nevada confession involuntary". Franklin v. State (Nev.) 610 P.2d 732.

Defendant's statements, made while in custody, to a visitor separated from defendant by a window between the booking cage and the visitor's room, were properly monitored and tape recorded by the police. A later confession made because of officer's knowledge of things said during above conversation was admissible. People v. Case (Cal.App.) 164 Cal.Rptr. 662.